

Bill Introduced that Would Expand Veterans' Preference in Federal Employment to Include Reserve Component Members

By Captain Samuel F. Wright, JAGC, USN (Ret.)²

8.0—Veterans' preference

Under the Veterans' Preference Act of 1944 (VPA), certain veterans receive an advantage when trying to secure federal civilian jobs. Veterans who have service-connected disabilities rated at 30% or more receive ten points of veterans' preference. Veterans who served on active duty during "wartime" receive five points. On August 2, 1990, immediately after Saddam Hussein's Iraq invaded and occupied Kuwait, President George H.W. Bush declared a national emergency, and that period of national emergency has not been terminated. All persons who have served on active duty honorably since August 1990 have received the five-point preference. During "peacetime," individuals who serve on active duty receive the five-point preference only if they have personally participated in a campaign or expedition for which a ribbon was awarded.

On July 18, 2013, Senator Joe Donnelly (Indiana) introduced S. 1320, which would expand the classes of persons entitled to veterans' preference in federal employment. The bill was referred

¹I invite the reader's attention to <https://www.roa.org/page/LawCenter>. You will find more than 2000 "Law Review" articles about the Uniformed Services Employment and Reemployment Rights Act (USERRA), the Servicemembers Civil Relief Act (SCRA), the Uniformed and Overseas Citizens Absentee Voting Act (UOCAVA), the Uniformed Services Former Spouse Protection Act (USFSPA), and other laws that are especially pertinent to those who serve our country in uniform. You will also find a detailed Subject Index, to facilitate finding articles about specific topics. The Reserve Officers Association, now doing business as the Reserve Organization of America (ROA), initiated this column in 1997.

²BA 1973 Northwestern University, JD (law degree) 1976 University of Houston, LLM (advanced law degree) 1980 Georgetown University. I served in the Navy and Navy Reserve as a Judge Advocate General's Corps officer and retired in 2007. I am a life member of ROA. For 43 years, I have worked with volunteers around the country to reform absentee voting laws and procedures to facilitate the enfranchisement of the brave young men and women who serve our country in uniform. I have also dealt with the Uniformed Services Employment and Reemployment Rights Act (USERRA) and the Veterans' Reemployment Rights Act (VRRRA—the 1940 version of the federal reemployment statute) for 36 years. I developed the interest and expertise in this law during the decade (1982-92) that I worked for the United States Department of Labor (DOL) as an attorney. Together with one other DOL attorney (Susan M. Webman), I largely drafted the proposed VRRRA rewrite that President George H.W. Bush presented to Congress, as his proposal, in February 1991. On 10/13/1994, President Bill Clinton signed into law USERRA, Public Law 103-353, 108 Stat. 3162. The version of USERRA that President Clinton signed in 1994 was 85% the same as the Webman-Wright draft. USERRA is codified in title 38 of the United States Code at sections 4301 through 4335 (38 U.S.C. 4301-35). I have also dealt with the VRRRA and USERRA as a judge advocate in the Navy and Navy Reserve, as an attorney for the Department of Defense (DOD) organization called Employer Support of the Guard and Reserve (ESGR), as an attorney for the United States Office of Special Counsel (OSC), as an attorney in private practice, and as the Director of the Service Members Law Center (SMLC), as a full-time employee of ROA, for six years (2009-15). Please see Law Review 15052 (June 2015), concerning the accomplishments of the SMLC. My paid employment with ROA ended 5/31/2015, but I have continued the work of the SMLC as a volunteer. You can reach me by e-mail at SWright@roa.org.

to the Committee on Homeland Security and Governmental Affairs. So far, the bill has eight co-sponsors: Senators Mark Begich (Alaska), Michael F. Bennett (Colorado), Roy Blunt (Missouri), Ted Cruz (Texas), Mike Johanns (Nebraska), Patrick J. Leahy (Vermont), Mark L. Pryor (Arkansas), and Brian Schatz (Hawaii).

On July 22, 2013, Representative Tim Walz¹ of Minnesota introduced an identical bill (H.R. 2785) in the House of Representatives, and that bill was referred to the Committee on Oversight and Government Reform. In the House there are also eight co-sponsors: Representatives Kerry L. Bentivolio (Michigan), Jeff Denham (California), Michael G. Fitzpatrick (Pennsylvania), Tom Latham (Iowa), Sean Patrick Maloney (New York), Richard B. Nugent (Florida), Jackie Speier (California), and Steve Stivers (Ohio).

Here is the Congressional Research Service (CRS) summary of these two identical bills:

Military Reserve Jobs Act of 2013 - Grants hiring preferences for federal employment to members of a reserve component of the Armed Forces who: (1) have successfully completed officer candidate training or entry level and skill training and have incurred, or are performing, a 6-year commitment with a reserve component (3 point preference); (2) have completed at least 10 years of service with a reserve component and has earned at least 50 retirement points per year (4 point preference); or (3) are retired from service in a reserve component and are eligible for, but have not yet begun receiving, retired pay for non-regular service (5 point preference).

We favor this legislation and any legislation that will help unemployed Reserve Component² (RC) personnel to find and hold civilian jobs, but this expansion of VPA coverage would be much more meaningful if it were coupled with an *effective* enforcement mechanism for veterans' preference. The VPA has largely become a dead letter because federal agencies routinely flout veterans' preference and get away with it.

When Congress enacted the VPA in 1944, it had in mind a model for individuals to obtain federal jobs, a model involving a written test with a numerical score. Let us assume that Smith (a non-veteran) scored a 90 on the exam, while Jones (a veteran of World War II) scored 88.

Jones' 88 beats Smith's 90 when the five-point preference is added. But in the 21st Century written examinations for federal employment are most unusual.

Fifteen years ago, Congress enacted the Veterans' Employment Opportunities Act, an imperfect attempt to put some teeth in the VPA. A preference-eligible veteran who claims that a federal agency has violated his or her VPA rights is now permitted to file a written complaint with the Veterans' Employment & Training Service, U.S. Department of Labor (DOL-VETS). The claimant must file with DOL-VETS within 60 days after the date of the alleged violation. See 5 U.S.C. 3330a(a). DOL-VETS investigates such complaints and has subpoena authority. 5 U.S.C. 3330a(b).

If DOL-VETS concludes, by a preponderance of the evidence, that the VPA complaint has merit, then DOL-VETS “shall attempt to resolve the complaint by making reasonable efforts to ensure that the agency specified in the complaint complies with applicable provisions of statute or regulation relating to veterans’ preference.” 5 U.S.C. 3330a(c)(1)(A). If DOL-VETS is unable to resolve the complaint, it must then notify the claimant in writing of the results of the DOL-VETS investigation. 5 U.S.C. 3330a(c)(2).

Unlike Uniformed Services Employment and Reemployment Rights Act (USERRA) cases, VPA cases are not referred anywhere by DOL-VETS. If the complainant about agency refuses the DOL-VETS requests that the agency comply with the VPA, as often happens, the claimant still must get a lawyer to initiate an enforcement action in the Merit Systems Protection Board (MSPB) to enforce his or her VPA claim. The MSPB does not give any deference to the DOL-VETS determination that the agency has violated the VPA. Congress should amend the law to provide for DOL-VETS to refer VPA claims to the Office of Special Counsel (OSC), and for OSC to represent VPA claimants in the MSPB, and if DOL-VETS has determined that a federal agency has violated the VPA the MSPB should be required to give deference to the DOL-VETS determination, unless it is shown to be clearly wrong.

The federal VPA requires federal agencies to give preference to veterans in hiring for federal agencies. Federal law does not require state and local governments to give preference to veterans in state and local government employment, but more than 40 states have veterans’ preference laws at the state level. You must look to state law to determine who is eligible for veterans’ preference, what it is that they are entitled to, and how these preferences are enforced.

We are in the process of updating and expanding the “State Laws” section of our website, www.servicemembers-lawcenter.org. We will be adding a new subsection about the state veterans’ preference laws, governing employment by the states themselves and their political subdivisions (counties, cities, school districts, etc.).

ROA departments and chapters can be very helpful to us in obtaining information on state veterans’ preference laws and (more importantly) in getting such laws enacted and broadened and in ensuring that they are effectively enforced.

Update – May 2022

As of May 2022, neither S.1320 nor H.R. 2785 have passed.

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This article is one of 1800-plus “Law Review” articles available at <https://www.roa.org/page/lawcenter>. The Reserve Officers Association, now doing business as the Reserve Organization of America (ROA), initiated this column in 1997. New articles are added each month.

ROA is almost a century old—it was established in 1922 by a group of veterans of “The Great War,” as World War I was then known. One of those veterans was Captain Harry S. Truman. As President, in 1950, he signed our congressional charter. Under that charter, our mission is to advocate for the implementation of policies that provide for adequate national security. For many decades, we have argued that the Reserve Components, including the National Guard, are a cost-effective way to meet our nation’s defense needs.

Indeed, ROA is the *only* national military organization that exclusively supports America’s Reserve and National Guard.

Through these articles, and by other means, we have sought to educate service members, their spouses, and their attorneys about their legal rights and about how to exercise and enforce those rights. We provide information to service members, without regard to whether they are members of ROA or eligible to join, but please understand that ROA members, through their dues and contributions, pay the costs of providing this service and all the other great services that ROA provides.

If you are now serving or have ever served in any one of our nation’s seven uniformed services, you are eligible for membership in ROA, and a one-year membership only costs \$20. Enlisted personnel as well as officers are eligible for full membership, and eligibility applies to those who are serving or have served in the Active Component, the National Guard, or the Reserve.

If you are eligible for ROA membership, please join. You can join on-line at www.roa.org or call ROA at 800-809-9448.

If you are not eligible to join, please contribute financially, to help us keep up and expand this effort on behalf of those who serve. Please mail us a contribution to:

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